

ESTTA Tracking number: **ESTTA731992**

Filing date: **03/08/2016**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91219616
Party	Defendant Bank, Daryl
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Date	03/08/2016
Attachments	Notice of District Court Determination.pdf(30700 bytes) Exhibit A.pdf(288896 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

PRUDENTIAL INSURANCE COMPANY
OF AMERICA

Plaintiff-Opposer,

vs.

DARYL BANK

Defendant-Applicant

Opposition No. 91219616
Serial No. 86184144

NOTICE OF DISTRICT COURT DETERMINATION

DARYL BANK, the Applicant of Serial No. 86184144, hereby provides the following Notice regarding the District Court's determination of Opposer's motion for sanctions.

The Board's Feb. 24, 2016 Order (D.E. 15) states as follows: "within **TWENTY DAYS** after the District Court's determination of Opposer's motion for sanctions, the parties shall so notify the Board so that this proceeding may be called up for appropriate action. Such notification to the Board should include a copy of the District Court's order."

On Feb. 16, 2016 (exactly 20 days ago), the U.S. District Court for the Southern District of Florida issued a Report and Recommendation on Plaintiff's Motion for Extension of Time and Motion to Enforce Subpoena and for Sanctions (D.E. 14). The aforesaid Report and Recommendation (attached as Exhibit A) states as follows:

"**ACCORDINGLY**, this Court recommends to the District Court that the Plaintiff's Motion for Extension of Time (DE 1) and Motion to Enforce Subpoenas and for Sanctions against Defendant Daryl Bank (DE 8) both be **DENIED**. This Court further recommends that the Motion to Enforce Subpoenas (DE 8) be denied without prejudice to pursuing the discovery

anew and that the Motion for Sanctions (DE 8) be denied without prejudice to seeking sanctions relief from the United States Trademark Trial and Appeal Board.”

On March 7, 2016, Applicant’s attorney contacted counsel for Opposer in an effort to prepare a joint notice to the Board regarding the aforesaid District Court’s determination, but counsel for Opposer refused to join this Notice.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Mar. 8, 2016 I served this document via U.S. mail to counsel of record for Opposer’s attorney, David Barnard, Lathrop & Gage LLP, 2345 Grand Blvd., Suite 2200, Kansas City, MO 64108.



Mark Terry, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-14021-MC-MARTINEZ/LYNCH

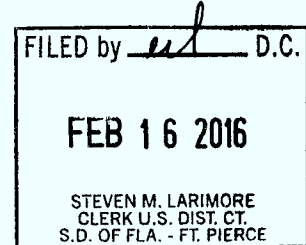
THE PRUDENTIAL INS. CO. OF AMERICA,

Plaintiff,

v.

DARYL BANK,

Defendant.



REPORT AND RECOMMENDATION ON
PLAINTIFF'S MOTION FOR EXTENSION OF TIME (DE 1) AND MOTION TO
ENFORCE SUBPOENA AND FOR SANCTIONS (DE 8)

THIS CAUSE comes before this Court upon an Order of Reference (DE 6) and the above Motions. Having reviewed the Motion for Extension of Time and its Response and Reply and having reviewed the underlying Motion to Enforce Subpoena and for Sanctions, this Court recommends as follows:

1. This Court begins by explaining why it is ruling by way of a Report and Recommendation on what is ostensibly framed in discovery-related terms. This Court rules by way of a Report and Recommendation because the Motions are in practical effect dispositive to this case. The merits of the parties' trademark dispute are being litigated before a different court: the Trademark Trial and Appeal Board of the United States Patent and Trademark Office. The instant case before this Court is limited

to the miscellaneous matter of the two subpoenas that this Court had issued.

2. The Plaintiff had asked the Clerk of Court of this District Court to issue two subpoenas. The first subpoena was issued to the company, "Dominion Diamonds, LLC, c/o Daryl G. Bank", and the second subpoena was issued to Catrinia Davis. Technically speaking, the subpoenas were issued to non-parties to the underlying trademark litigation. Nevertheless Dominion Diamonds, LLC, is the company of Defendant, Daryl Bank, of which he is president, and Catrinia Davis is his wife and another company officer. The Plaintiff subpoenaed Dominion Diamonds, LLC, and Mrs. Davis for their depositions. (The record suggests that the Plaintiff already had deposed the Defendant, Daryl Bank, in his personal capacity.) It is unknown whether counsel for the Plaintiff discussed the matter of deposing Dominion Diamonds, LLC, and Mrs. Davis with Defendant's counsel before seeking the subpoenas.

3. In any event the Plaintiff hired a process server to formally serve the subpoenas. The record indicates that the process server unsuccessfully tried to serve the subpoenas at Dominion Diamonds, LLC's business address. The process server next attempted to serve the subpoenas at the family residence of the Defendant, Mr. Bank, and his wife, Mrs. Davis. That attempt

to serve the subpoenas at the residential address ultimately led to the Defendant's arrest on assault-related charges.

4. As this Court summarizes the record before it, the process server initially was unable to get Mrs. Davis, and later Mr. Bank, to talk to her about the subpoenas. They both effectively ignored her. The process server therefore threw the subpoena paperwork through an already opened door that led into the residence's courtyard. The process server went to leave, but she saw Mr. Bank coming out of the home and approaching her. She gathered the paperwork back up to give it to him, but Mr. Bank approached her with a gun and chased her away in a very threatening and aggressive manner. The process server quickly left and went to the police. The police later arrested Mr. Bank. This Court makes no findings of fact as to what happened. This Court draws the above summary from the record before it, and this Court uses the summary merely for background and contextual purposes.

5. The Clerk of Court issued the subpoenas on July 14, 2015. The alleged assault incident occurred on July 21, 2015. The Plaintiff did not seek relief from this Court until January 21, 2016. Thus the parties dispute whether the Plaintiff seeks relief from this Court in a timely fashion. Local Rule 26.1(g)(1) requires parties to file discovery-related motions within 30 days of the occurrence of grounds for the motion. The

Plaintiff argues that it has good cause for not filing a motion before this Court sooner. After the alleged assault incident, the Plaintiff sought relief from the Trademark Trial and Appeal Board ("Board") where the parties' underlying trademark dispute is pending. The Board denied the Plaintiff's motion on December 22, 2015. The Board denied the motion without prejudice to the Plaintiff seeking relief before this Court.

6. To the extent the Plaintiff does seek discovery-related relief regarding the two subpoenas that this Court had issued, this Court finds the Plaintiff's present Motions untimely. If the Plaintiff intended to seek relief from this Court on the two subpoenas that it had issued, it should have done so within 30 days of the alleged assault incident. Moreover, even if the time while the matter was pending before the Board had tolled Local Rule 26.1(g)(1)'s 30-day deadline to act, the Plaintiff's present Motions still would be untimely. The Board rendered its decision on December 22, 2015. The Plaintiff waited until January 21, 2016 to seek relief from this Court, and even then, it was not ready to proceed. The Plaintiff asked for an additional two weeks to file its Motion to Enforce Subpoenas and for Sanctions. It is unknown why the Plaintiff was unable to proceed within 30 days of the Board's decision on the issue's merits. The Plaintiff says that the case is procedurally complex and presents unusual circumstances that had to be

researched. This explanation is unpersuasive. This Court sees no legitimate reason for needing a month and a half's time, especially after the issue already had been briefed before the Board. This Court therefore finds the Plaintiff's Motions untimely.

7. The dispute over the Motions' timeliness is a moot point anyway. In neither the motion before the Board nor in the Motions before this Court now does the Plaintiff seek discovery relief directly related to the subject subpoenas or the subpoenaed parties. The Plaintiff does not seek to compel the subpoenaed parties to attend deposition, for example. That is not the Plaintiff's primary focus. Instead the Plaintiff seeks relief in the form of sanctions against Defendant, Mr. Bank, both in regards to the alleged assault incident and for the course of discovery, generally, in the trademark litigation. The Plaintiff seeks sanctions in the form of a ruling on the merits of the underlying trademark dispute in its favor. The Plaintiff also seeks discovery-related sanctions that go beyond the two subpoenas that this Court had issued. This Court declines to render relief that exceeds the scope of the two subpoenas that it had issued or that affects the merits of the underlying patent dispute.

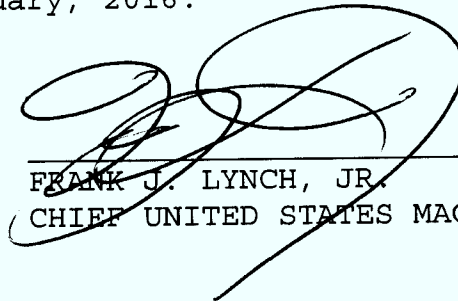
8. The discovery-related dispute is moot for another reason. In regards to the Defendant's alleged behavior in

response to being served with this Court's subpoenas, this Court notes that local law enforcement is already handling that matter. This Court therefore declines to consider the Defendant's behavior in favor of (1) allowing the Board to consider whether Mr. Bank's behavior affects the merits of the underlying trademark dispute and (2) in favor of law enforcement handling any potential criminal aspects of the assault. This Court discerns no primary request for relief directly related to the subpoenas---such as a request to compel the non-parties to comply---but to the extent the Plaintiff does ask for such direct relief, the Motions are untimely. The Motions therefore should be denied, but without prejudice to the Plaintiff issuing new subpoenas to the non-parties or to seeking sanctions relief before the Board.

ACCORDINGLY, this Court recommends to the District Court that the Plaintiff's Motion for Extension of Time (DE 1) and Motion to Enforce Subpoenas and for Sanctions against Defendant Daryl Bank (DE 8) both be **DENIED**. This Court further recommends that the Motion to Enforce Subpoenas (DE 8) be denied without prejudice to pursuing the discovery anew and that the Motion for Sanctions (DE 8) be denied without prejudice to seeking sanctions relief from the United States Trademark Trial and Appeal Board.

The parties shall have fourteen (14) days from the date of this Report and Recommendation within which to file objections, if any, with the Honorable Jose E. Martinez, the United States District Judge assigned to this case. Failure to file timely objections shall bar the parties from a de novo determination by the District Court of the issues covered in this Report and Recommendation and bar the parties from attacking on appeal the factual findings contained herein. LoConte v. Dugger, 847 F.2d 745, 749-50 (11th Cir. 1988), cert. denied, 488 U.S. 958 (1988).

DONE AND SUBMITTED in Chambers at Fort Pierce, Florida,
this 16th day of February, 2016.



FRANK J. LYNCH, JR.
CHIEF UNITED STATES MAGISTRATE JUDGE

cc: Hon. Jose E. Martinez
Patricia Lehtinen Silva, Esq.
Mark Terry, Esq.